

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FERRILL JOSEPH VOLPICELLI,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:08-CV-00237-RCJ-(VPC)

ORDER

Before the Court are the Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#5), Respondents' Answer (#18), and Petitioner's Reply (#24). The Court finds that Petitioner is not entitled to relief and denies the Petition (#5).

The Court has reviewed the transcript of Petitioner's trial. See Ex. 54 (#20-18). The Nevada Supreme Court accurately summarized the evidence presented:

At trial, the State presented evidence, including police officer testimony and audiotapes of telephone conversations, that Volpicelli, while in custody at the Washoe County Jail, spoke with his teenage son, Travis Volpicelli, by telephone and coaxed him into retrieving a check that Volpicelli knew had been confiscated from Travis by law enforcement officers for evidentiary purposes. During the telephone call, Volpicelli specifically instructed Travis to go back to the Washoe County Jail, which had previously issued a check to Travis, and request that a new check be issued. When Travis questioned the propriety of his father's request, Volpicelli told Travis: "You're not lying; just tell them you don't have it anymore. Somebody took it. You just came home and it was gone." Travis agreed and, thereafter, went to the Washoe County Jail and lied to the clerk, telling her that the check had been misplaced and that he needed a new one. The Clerk, who was aware that the prior check had been voided, contacted detectives and then issued Travis a new check. Travis was arrested as he attempted to exit the jail. Volpicelli was subsequently charged with aiding and abetting Travis in attempting to obtain money by false pretenses.

Ex. 54, pp. 2-3 (#21-7, pp. 3-4).¹

¹Page numbers in parentheses refer to the electronic documents in the Court's computer docket.

Petitioner was charged with aiding and abetting the commission of burglary and aiding and abetting the commission of an attempt to obtain money by false pretenses. Ex. 9 (#19-10). After a bench trial, Petitioner was convicted of aiding and abetting in the commission of an attempt to obtain money by false pretenses. Ex. 61 (#20-25). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 79 (#21-7). Petitioner then filed a post-conviction petition for a writ of habeas corpus in the state district court. Ex. 83 (#21-11). The district court denied the petition. Ex. 104 (#21-32). Petitioner appealed. The Nevada Supreme Court reversed in part on one ground: Petitioner's appellate counsel was ineffective for failing to argue that the district court had directed that the sentence in this case run consecutively to the sentence in another case in which judgment had not yet been entered. The Nevada Supreme Court remanded for entry of an amended judgment of conviction that struck that consecutive-sentence provision. Ex. 125, p. 13 (#22-17, p. 14). The Nevada Supreme Court affirmed on all other grounds.

Petitioner then commenced this action. The Court dismissed all grounds but Ground One. Order (#4). Respondents have answered the remaining ground.

"A federal court may grant a state habeas petitioner relief for a claim that was adjudicated on the merits in state court only if that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" Mitchell v. Esparza, 540 U.S. 12, 15 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

A state court's decision is "contrary to" our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." A state court's decision is not "contrary to . . . clearly established Federal law" simply because the court did not cite our opinions. We have held that a state court need not even be aware of our precedents, "so long as neither the reasoning nor the result of the state-court decision contradicts them."

Id. at 15-16. "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant

1 state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that
 2 application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)
 3 (internal quotations omitted).

4 [T]he range of reasonable judgment can depend in part on the nature of the relevant rule.
 5 If a legal rule is specific, the range may be narrow. Applications of the rule may be
 6 plainly correct or incorrect. Other rules are more general, and their meaning must
 7 emerge in application over the course of time. Applying a general standard to a specific
 8 case can demand a substantial element of judgment. As a result, evaluating whether a
 9 rule application was unreasonable requires considering the rule’s specificity. The more
 10 general the rule, the more leeway courts have in reaching outcomes in case-by-case
 11 determinations.

12 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

13 The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled
 14 to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

15 Ground One contains several claims of ineffective assistance of counsel. “[T]he right to counsel
 16 is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 & n.14
 17 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense
 18 attorney’s representation “fell below an objective standard of reasonableness,” Strickland v.
 19 Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney’s deficient performance prejudiced the
 20 defendant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the
 21 result of the proceeding would have been different,” id. at 694. “[T]here is no reason for a court
 22 deciding an ineffective assistance claim to approach the inquiry in the same order or even to address
 23 both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697.

24 Strickland expressly declines to articulate specific guidelines for attorney performance beyond
 25 generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the duty to
 26 advocate the defendant’s cause, and the duty to communicate with the client over the course of the
 27 prosecution. 466 U.S. at 688. The Court avoided defining defense counsel’s duties so exhaustively as
 28 to give rise to a “checklist for judicial evaluation of attorney performance. . . . Any such set of rules
 would interfere with the constitutionally protected independence of counsel and restrict the wide latitude
 counsel must have in making tactical decisions.” Id. at 688-89.

1 Review of an attorney's performance must be "highly deferential," and must adopt counsel's
2 perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight."
3 Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that counsel's
4 conduct falls within the wide range of reasonable professional assistance; that is, the defendant must
5 overcome the presumption that, under the circumstances, the challenged action 'might be considered
6 sound trial strategy.'" Id. (citation omitted).

7 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair proceeding
8 with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v. Woodford, 290 F.3d
9 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell below an objective
10 standard of reasonableness alone is insufficient to warrant a finding of ineffective assistance. The
11 petitioner must also show that the attorney's sub-par performance prejudiced the defense. Strickland,
12 466 U.S. at 691-92. There must be a reasonable probability that, but for the attorney's challenged
13 conduct, the result of the proceeding in question would have been different. Id. at 694. "A reasonable
14 probability is a probability sufficient to undermine confidence in the outcome." Id.

15 If a state court applies the principles of Strickland to a claim of ineffective assistance of counsel
16 in a proceeding before that court, the petitioner must show that the state court applied Strickland in an
17 objectively unreasonable manner to gain federal habeas corpus relief. Woodford v. Visciotti, 537 U.S.
18 19, 25 (2002) (per curiam).

19 First, Petitioner that at sentencing counsel failed to put forth Petitioner in the best light available
20 and did nothing more than agree with the State in requesting an appropriate sentence. The record, and
21 Petitioner's own allegations, do not bear out this claim. Counsel asked for a sentence with a minimum
22 term of twelve months and a maximum term of thirty months. For the amount of money involved in
23 this case, obtaining money by false pretenses is a category B felony. Nev. Rev. Stat. § 205.380(1)(a).
24 An attempt to commit a category B felony is itself a category C felony. Nev. Rev. Stat.
25 § 193.330(1)(a)(3). Unless otherwise provided, a category C felony is punished by a minimum term
26 in prison no less than twelve months and a maximum term in prison no more than sixty months. Nev.
27 Rev. Stat. § 193.130(2)(c). Furthermore, the minimum term must be no more than forty percent of the
28 maximum term. Nev. Rev. Stat. § 193.130(1). The prosecution asked for the greatest possible

1 sentence, with a minimum term of twenty-four months and a maximum term of sixty months. Ex. 62,
2 p. 6 (#20-26, p. 7). Counsel asked for the lightest possible sentence, because the minimum term could
3 not have been less than twelve months and the maximum term could not have been less than thirty
4 months by operation of the forty percent rule. Counsel did what Petitioner claims he should have done.

5 Second, Petitioner takes exception to counsel's statement that Petitioner had an extensive
6 criminal history. Petitioner takes the statement out of context. Counsel stated:

7 The Court has heard this case, so I won't belabor the matter, but I would ask the Court
8 to also consider perhaps a 12 to 30 month sentence in this instance; and the reason why
9 I suggest that—and run it—and ask that the Court consider running it concurrent is the
fact that Mr. Volpicelli, as we know, has an extensive criminal history but at the same
time also has some severe, I think, psychological problems.

10 In addition, he's also facing federal revocation. So he's going to be in for a long period
11 of time. This at least gives him some light at the end of the tunnel. I think that it also
12 will allow him to do some things which I think he really must do in the prison system
to help himself, and that is avail himself of all the psychological help that he can get
while there.

13 Ex. 62, p. 4 (#20-26, p. 5). Counsel was not highlighting Petitioner's criminal history, he was trying
14 to minimize Petitioner's criminal history. The argument seemed to have been effective, because the
15 judge stated, "The Court believes the sentence should measure the crime and the offense that took place,
16 not pile on years just because of your criminal history." *Id.*, p. 7 (#20-26, p. 8). The judge then
17 sentenced Petitioner to a minimum term of twelve months and a maximum term of forty-eight months.
18 *Id.* That was less than the prosecution's request and closer to Petitioner's request, at least in the
19 minimum term.

20 Third, Petitioner argues that counsel failed to investigate Petitioner's mental state. Petitioner's
21 mental state already was before the trial court. Petitioner went through two rounds of psychiatric
22 examinations. *See* Ex. 14 (#19-15); Ex. 45 (#20-9). The report, as related by the prosecutor, stated,
23 "The client's symptoms reflect an emotional response to his untenable situation, facing severe long-term
24 consequences arising from criminal conduct, if convicted, and personality characteristics represented
25 by an obsession of unjust, but unsolvable entanglement with the criminal justice system." Ex. 45, p.
26 5 (#20-9, p. 6). Even if counsel did not put forth evidence of Petitioner's psychological problems at
27 sentencing, the trial court already knew of those problems.

1 Fourth, Petitioner argues that counsel failed to interview friends and family, and that counsel
 2 failed to call them as witnesses at the sentencing hearing. The Court agrees with Respondents that
 3 Petitioner does not allege that he ever informed counsel of his wishes that these witnesses be called and
 4 does not allege what testimony these witnesses would have presented.

5 On these issues, the Nevada Supreme Court held:

6 Fourth, appellant claimed that his trial counsel was ineffective for failing to present
 7 mitigating evidence at sentencing. Specifically, appellant claimed that his trial counsel
 8 failed to present evidence concerning appellant's history of psychological problems and
 9 use of psychotropic medication, present witnesses to testify to his "social, ethical and
 10 moral background," and argue for a lesser sentence than that sought by the State.
 11 Appellant failed to demonstrate that his trial counsel was deficient or that he was
 12 prejudiced. Appellant's trial counsel argued that appellant had suffered from
 13 psychological problems. Further, appellant failed to identify the specific conditions
 14 from which he suffered and the medications he had taken. Moreover, appellant did not
 15 demonstrate that had counsel presented the purported mitigating evidence his sentence
 16 would have been different. Lastly, appellant's counsel argued for a sentence of 12 to 30
 17 months in prison, a lesser sentence than the sentence of 24 to 60 months in prison that
 18 was sought by the State. Appellant's counsel did not concur with the State's sentence
 19 recommendation. Therefore, the district court did not err in denying this claim.

20 Ex. 125, pp. 6-7 (#22-17, pp. 7-8) (citation omitted). In light of the facts in the record, described above,
 21 this was a reasonable application of Strickland.

22 Fifth, Petitioner argues that trial counsel failed to object to statements by the prosecutor at
 23 sentencing that Petitioner is a dangerous man. See Ex. 62, p. 6 (#20-26, p. 7). On this issue, the
 24 Nevada Supreme Court held:

25 Fifth, appellant claimed that his trial counsel was ineffective for failing to object to
 26 unfounded statements made by the prosecution during the sentencing hearing.
 27 Specifically, appellant asserted that the State improperly claimed that he was
 28 "dangerous." Appellant failed to demonstrate that he was prejudiced. This court has
 consistently afforded the district court wide discretion in its sentencing decision. "[T]his
 court will reverse a sentence if it supported solely by impalpable and highly suspect
 evidence." The State argued that appellant was dangerous because he was able to
 persuade other people, in the instant case as well as other cases, to commit crimes on his
 behalf. The State did not claim that appellant had committed crimes of violence.
 However, even assuming that the State's counsel's statement was highly suspect, we
 conclude that the district court's sentence was not based solely upon the statement. The
 district court indicated that it sentenced appellant based on his conduct in the present
 case alone and not based on his prior criminal history. Therefore, the district court did
 not err in denying the claim.

26 Ex. 125, pp. 7-8 (#22-17, pp. 8-9) (citations omitted). The prosecution's argument was correct because
 27 Petitioner did persuade his son to commit a crime. This was a reasonable application of Strickland.

1 Also before the Court is Petitioner's Renewed Motion to Reconsider (#23) the dismissal of
2 Grounds Three and Six, Respondents' Opposition (#25), and Petitioner's Reply (#26). Petitioner has
3 persuaded the Court that its initial conclusion was correct. Petitioner provided a transcript of the
4 telephone conversation between himself and his son, in which he persuaded his son to return to the jail
5 to get another check. It states, in relevant part:

6 FERRILL: What I was wondering is why don't you just go, uh, call Washoe County and
7 just say you know that check you gave me, I lost it, give me another one.

8 TRAVIS: Yeah, that's true.

9 FERRILL: What do you think? You wanna try it? Can't hear ya.

10 TRAVIS: I don't know.

11 FERRILL: You don't want to do it?

12 TRAVIS: I don't know.

13 FERRILL: Is there someone there?

14 TRAVIS: No.

15 FERRILL: Why? You think there's something wrong with that?

16 TRAVIS: Well, I . . .

17 FERRILL: Why don't you just say I came home and somebody took it. I don't have it
18 anymore.

19 TRAVIS: Yeah.

20 FERRILL: And that's not lying. Somebody took it I guess.

21 TRAVIS: Yeah, that's true.

22 FERRILL: Right?

23 TRAVIS: Yeah.

24 FERRILL: So why don't you work on that tomorrow so you can get some money.

25 TRAVIS: Alright.

26 Renewed Motion, Ex. A, pp. 1-2 (#23, pp. 8-9). The evidence presented at the trial showed that
27 Petitioner had no right to the wallet or the money. The items were seized pursuant to his arrest on
28 charges not at issue in this action, and only an error kept them out of evidence and put them into
property that could be released. See Ex. 54, p. 26 (#20-18, p. 9). Petitioner told his son to give

1 statements to the jail officials that would be lies. Travis did not "lose" the check, nor did "somebody"
2 take the check; police officers recovered items that should have been placed into evidence. Petitioner
3 further lied by stating that those statements would not be lies. With respect to Ground Three, Petitioner
4 himself has proven that he committed the crime.

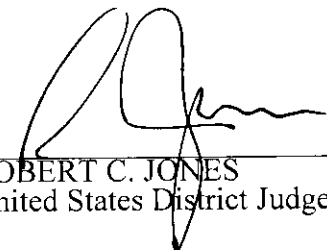
5 The Court's reasoning with respect to Ground Six also stands. Even if the recovery of the check
6 and the wallet were illegal, the officers' error did not give Petitioner leave to commit a crime himself.

7 IT IS THEREFORE ORDERED that Petitioner's Renewed Motion to Reconsider (#23) is
8 **DENIED.**

9 IT IS FURTHER ORDERED that the Petition for a Writ of Habeas Corpus (#5) is **DENIED.**
10 The Clerk of the Court shall enter judgment accordingly.

11 Dated: This 5th day of October, 2009.

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ROBERT C. JONES
United States District Judge